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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BANKERS TRUST COMPANY,

Petitioner,

—v.—

DANIEL RHOADES, HERMAN SOIFER, MILTON BRATEN, BROOKFIELD CLOTHES, INC., BROOKFIELD INDUSTRIES, INC., BENNINGTON COURT LTD., BRAXTON LTD., AURA BY LAURIE LTD., ERWIN COMMERCIAL CORP., MICHAEL B. MARKS, INC., TIMELY TEXTILES, INC., TODD EQUIPMENT LEASING CO., INC., CAPITAL AID CORPORATION and "JOHN DOES NOS. 1-50",

Respondents.

BRIEF OF RESPONDENT HERMAN SOIFER IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Should a petition for a writ of certiorari be denied where a complaint for treble damages under the civil provisions of RICO has been dismissed because plaintiff's injury arose from the underlying predicate acts rather than from the prohibited pattern of racketeering?

2. Even if dismissal of a complaint seeking treble damages for an injury from the underlying predicate acts should not have been affirmed on the grounds stated in the decision below, should a petition for a writ of certiorari nevertheless be denied because, among other things,

   (a) review of the RICO injury requirement at this time would be premature;

   (b) no relief is available under the civil provisions of RICO for an injury deriving from a simple breach of contract;

   (c) the claim asserted can be pursued only in the bankruptcy court; and

   (d) the applicable statute of limitations has expired?

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BRIEF OF RESPONDENT HERMAN SOIFER IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondent Herman Soifer ("Soifer") respectfully submits this brief in opposition to the petition of Bankers Trust Company ("Bankers") for a writ of certiorari.

OPINIONS BELOW

The opinion below of the United States Court of Appeals for the Second Circuit is reported at 741 F.2d 511 (1984) and is reproduced in the Appendix to Bankers' petition ("App.") at 3a-32a. That decision affirmed the judgment entered by the United States District Court for the Southern District of New York following its decision in *Bankers Trust Co.* v. *Feldesman*, which is reported at 566 F. Supp. 1235 (1983) and is reproduced in the Appendix at 33a-47a.

COUNTERSTATEMENT OF THE CASE

As the petition itself states (at 6), this action arises out of Bankers' frustration in collecting a debt. Bankers, one of many creditors of Braten Apparel Corp. ("BAC"), seeks to pursue a claim under the civil provisions of RICO.[1] In substantial part, Bankers' claim is that, as a result of various alleged wrongful acts, the bankruptcy court confirmed a Chapter XI plan of arrangement relieving BAC of more than $4.3 million in debt. Petition at 5. According to Bankers, the creditors of BAC had been induced to accept the plan by respondents' concealment of the fact that BAC owned a valuable asset, Brookfield Clothes, Inc. ("Brookfield"). Bankers alleges that, as a result of this concealment, BAC secured a discharge of indebtedness to which it was not entitled when, in March 1976, the bankruptcy court confirmed the BAC plan. Petition at 5.

Shortly thereafter, Bankers learned of the alleged concealment of the Brookfield asset. 741 F.2d at 513; App. 7a. As a result Bankers, in September 1976, commenced a proceeding in the bankruptcy court to revoke the confirmation of the BAC plan. 741 F.2d at 513; App. 7a. In June 1982, the bankruptcy court revoked that confirmation and ordered BAC to offer a

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1 "RICO", an acronym for "racketeer influenced corrupt organizations," refers to various criminal prohibitions and civil remedies set forth in 18 U.S.C. §§ 1961 *et seq*. The relevant statutory provisions are reproduced in the Appendix at 128a-33a.

modified plan, reflecting its ownership of Brookfield. 741 F.2d at 513; Petition at 6; App. 8a.[2]

According to Bankers, it discovered that Brookfield was insolvent following the revocation (Petition at 7) and, in August 1982, on its own behalf, Bankers commenced the present action—in the United States District Court and not in the bankruptcy court. Soifer, who had been an officer of Brookfield and a shareholder of BAC, was named as one of many defendants.

In February 1983, Soifer moved to dismiss the complaint on a number of grounds. As relevant here, he showed that Bankers could not maintain a RICO action because

> (a) the sole injury alleged—a shortfall on its debt collection from BAC—was caused directly by the predicate act of bankruptcy fraud;
>
> (b) its claims derived from its status as a creditor of BAC and could only be pursued in the pending bankruptcy court proceeding involving BAC; and
>
> (c) any right to relief was barred by the applicable statute of limitations.[3]

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2 The bankruptcy court proceeding involving BAC is still pending. Although a modified plan has been proposed, no order has been entered thereon. Nor, as of this date, has the proceeding been converted to Chapter VII of the former Bankruptcy Act, under which a trustee could be appointed to act on behalf of all of the creditors. This Court may take judicial notice of these facts under Rule 201, Fed. R. Evid.

3 In addition, because the complaint on its face was subject to dismissal as against Soifer even if it stated a claim against the other defendants, Soifer's motion also showed that (i) only one predicate act was alleged against him; and (ii) the claims asserted against him did not satisfy Rule 9(b), Fed. R. Civ. P.

Surprisingly, Bankers does not include the complaint in its Appendix, although it was reproduced at A27-A46 in Bankers' appendix to the Second Circuit. The only meaningful allegations in the complaint relating to Soifer concern the alleged concealment of the Brookfield asset. Allegations relating to subsequent actions, such as the so-called bribery and the 1982 disappearance of Brookfield's assets, were directed specifically only at other defendants.

The District Court entered a judgment dismissing the complaint on the ground that it failed to state a claim, holding that the civil provisions of RICO provide relief only for a "distinct RICO injury" caused by a pattern of racketeering activity rather than by the predicate acts that constitute the pattern. In so doing, it did not address the other grounds urged by Soifer in support of his motion. *See* 566 F. Supp. at 1242 n.10; App. 47a n.10.

The Second Circuit, in affirming the dismissal of the complaint, substantially agreed with the District Court's conclusion with respect to the requirement of a distinct RICO injury; it did not address the other arguments urged by Soifer.

SUMMARY OF ARGUMENT

The writ should be denied because the decision of the Second Circuit was correct. By its terms, 18 U.S.C. § 1964(c) limits the right to seek treble damages to situations where a plaintiff alleges that his injury resulted from the conduct of an enterprise through a pattern of racketeering activity, as defined and proscribed by § 1962. Because Bankers has not alleged an injury of that nature it cannot maintain this action.

Furthermore, regardless of whether the Second Circuit was correct on the issue of RICO injury, this is an inappropriate case for review by this Court inasmuch as

(a) review of the RICO injury requirement at this time would be premature;

(b) no relief is available under the civil provisions of RICO for an injury deriving from a simple breach of contract;

(c) the claim asserted can be pursued only in the bankruptcy court; and

(d) the applicable statute of limitations has expired.

REASONS FOR DENYING THE WRIT

I

THE COURT BELOW PROPERLY HELD THAT § 1964(c) REQUIRES AN ALLEGATION OF AN INJURY RESULTING FROM A PATTERN OF RACKETEERING ACTIVITY

The central issue raised by Bankers' petition is whether the Court below erred in a matter of statutory construction: Is a private plaintiff seeking treble damages under § 1964(c) required to allege injury resulting from the acquisition, maintenance or conduct of an enterprise through a *pattern* of racketeering activity? Or does such a plaintiff merely need to allege injury from some of the predicate acts which may have constituted underlying *elements* of that pattern?

The Court below held that the statute requires an allegation of injury from the use of a pattern of racketeering activity in connection with a RICO enterprise. The Court therefore affirmed dismissal of Bankers' complaint because it alleged only an injury caused by the predicate act of bankruptcy fraud.

In support of its petition, Bankers argues that injury from a predicate act is sufficient. However, as will be shown below, Bankers' theory is contrary to the language of the statute, when read either in isolation from, or with reference to, its legislative history. To the degree that Bankers' petition rests on the assertion of a conflict between the decision below and decisions of other circuits, those conflicts are either illusory or inappropriate for resolution on a writ of certiorari in the present case.

A. The Language Of The Statute Clearly Requires An Allegation Of An Injury Resulting From A Pattern Of Racketeering Activity

An understanding of the scope of RICO liability must begin with examination of the structure and language of the statute itself. *United States* v. *Turkette*, 452 U.S. 576, 580 (1981).

The provisions of RICO were enacted as Title IX of the Organized Crime Control Act of 1970, Pub. L. 91-452, 84 Stat. 941. The statute as a whole was designed for use by federal law enforcement agencies in fighting organized crime. However, one section, 1964(c), authorizes civil actions for treble damages at the instance of private parties.

That section provides:

> "Any *person injured in his business or property by reason of a violation of section 1962* of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." App. 133a.

The decision below (741 F.2d at 515-16; App. 12a-14a) analyzed the italicized language by dividing it into three crucial elements:

> (i) the plaintiff's injury must be of a proprietary nature ("business or property");
>
> (ii) the plaintiff's injury must be caused by the defendant's wrongful conduct ("by reason of"); and
>
> (iii) the defendant's conduct must constitute a "violation of section 1962."

Only the third of these—what kind of conduct constitutes a "violation of section 1962"—is at issue here.

Section 1962 is at the core of the criminal provisions of RICO. Among other things, it declares unlawful (a) an investment of income derived from a "pattern of racketeering activity" in any enterprise[4] that is engaged in interstate commerce; (b) the acquisition of such an enterprise through a pattern of racketeering activity; (c) the conduct of such an enterprise's affairs through a pattern of racketeering activity;

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4 Under § 1961(4), the definition of an " 'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." App. 129a.

or (d) the conspiracy to do any of the foregoing acts. *See* App. 130a-31a.

"Racketeering activity" is defined in the statute as the commission of certain federal or state offenses specified in § 1961(1). These are commonly referred to as "predicate acts." A "pattern of racketeering activity" is defined in § 1961(5) as "requir[ing] at least two acts of racketeering activity" within a ten-year period. App. 129a.[5]

When these definitions are read together, a "violation of § 1962(c)" means that there must have been both a pattern of predicate acts *and* the use of that pattern to conduct the affairs of an enterprise. To satisfy these statutory prerequisites, a private plaintiff must allege the existence and use of such a pattern, as well as an injury resulting therefrom.

The converse is equally true. If all that a private plaintiff alleges is a direct injury from two or more predicate acts, and not from the combination of those acts into a distinct pattern of racketeering activity, then he has no basis under the statute to recover treble damages. Section 1964(c) simply does not grant relief to "any person injured by reason of two or more offenses specified in § 1961(1)." It explicitly requires an allegation of injury by reason of "a violation of § 1962," *i.e.*, by reason of the use of the *pattern* of racketeering activity to conduct the affairs of an enterprise.[6]

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5 In *Sedima, S.P.R.L.* v. *Imrex Co.*, 741 F.2d 482 (2d Cir. 1984) [App. 48a-106a], *petition for cert. filed*, 53 U.S.L.W. 3367 (Oct. 22, 1984) (No. 84-648), another panel of the Second Circuit held, among other things, that a criminal conviction must be alleged in an action by a private party under the civil provisions of RICO. That issue was not addressed by the panel below (741 F.2d at 516 n.5; App. 14a n.5) and is not raised by the petition herein.

6 This point was well expressed in *Friedlander* v. *Nims*, 571 F. Supp. 1188, 1194 (N.D. Ga. 1983), where the Court dismissed a RICO claim in a securities action:

> "The plaintiff here alleges fraud. Fraud alone, and injury from it, do not give rise to RICO liability.
>
> RICO prohibits, broadly speaking, second stage criminal activity. RICO does not punish or provide a remedy for murder, kidnapping,

As stated by the Court below:

> "Section 1964(c) does not provide a private right of recovery unless the conduct that caused the injury was 'a violation of section 1962.' We must therefore ask what conduct violates that section. Although, as detailed above, § 1962 has a number of facets, it is clear that it does not itself prohibit the predicate acts that constitute racketeering activity. Commission of two or more predicate acts is but an element of a § 1962 violation; those acts do not themselves constitute the § 1962 violation. Indeed, § 1962 does not even prohibit a pattern of racketeering activity, without more. Rather, there is a violation of § 1962 only if there are present both (1) the pattern of racketeering activity, and (2) the use of that pattern to invest in, control, or conduct, a RICO enterprise. It is this confluence that constitutes the violation and, therefore, the confluence that must cause the proprietary injury.
>
> The import of this analysis is that if a complaint alleges a proprietary injury that is caused by the defendant's predicate acts, rather than by its use of a pattern of racketeering activity in connection with a RICO enterprise, the injury cannot be said to have been caused by 'a violation of section 1962.' *See Sedima, S.P.R.L.* v. *Imrex Co.* . . . Accordingly, we agree with the conclusion of the district court that a civil RICO complaint must allege 'a distinct RICO injury,' by which we mean that it must allege a proprietary injury caused by a RICO violation, not just one caused by some of the essential elements of a RICO violation." 741 F.2d at 516; App. 13a-14a (footnotes omitted).

The Court below thus read the requirement that the injury stem from the *pattern* of racketeering activity as "the plain

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arson, or fraud. It punishes, or provides a remedy for, the operation—acquisition, investment, maintenance, or conduct—of enterprises *through* racketeering activity or as a *result* of racketeering activity. Nothing of the sort is alleged here." (emphasis in original).

meaning of § 1964(c)." It therefore saw "no basis for inferring that Congress did not intend what it plainly said" and rejected Bankers' argument that the statute's legislative history justified wiping away the clearly drawn lines between predicate acts and the pattern of racketeering. 741 F.2d at 517; App. 15a.[7]

Applying that principle to the allegations of the complaint, the Court below properly concluded that Bankers' sole cognizable injury flowed directly from an alleged act of bankruptcy fraud in 1976 which prevented collection of an outstanding debt. 741 F.2d at 517-18; App. 17a-18a. This was an individual predicate act[8] for which Bankers already possessed a remedy under federal law. As there was no "pattern" and no violation of § 1962, dismissal of Bankers' complaint was held to be mandated by the language of the statute.

B. The Legislative History Of RICO Does Not Support Bankers' Interpretation Of The Statute

Although Bankers attempts to invoke the "plain meaning" of the statute, the thrust of its argument is to seek support in RICO's "long and complex" legislative history. However, the legislative history referred to (Petition at 15-17) relates primarily to the criminal provisions of RICO and to remedies avail-

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7 *Sedima* was in accord with the decision below in holding that § 1964(c) requires allegation of a distinct RICO injury. *Sedima* affirmed dismissal of the complaint because it failed to allege the *kind* of injury at which the statute was directed, *i.e.*, injury to "investors and competitors" when "mobsters, either through the infiltration of legitimate enterprises or through the activities of illegitimate enterprises, cause systemic harm to competition and the market." 741 F.2d at 495-96; App. 74a. The test in *Sedima*, if applied in this case, would also support dismissal of Bankers' complaint.

8 The Court below, noting the possibility that any alleged fraudulent scheme could be fragmented so that different phases are characterized as different statutory violations, commented that a determination of the sufficiency of such fragmented allegations was "a matter best left, in the first instance, to the discretion of the district judge." 741 F.2d at 518 n.7; App. 17a n.7.

able to the government. Indeed, by repeatedly stressing Congress' intention of fighting "organized criminal activity," Bankers only highlights the inapplicability of the civil provisions of RICO to an ordinary commercial dispute involving the nonpayment of a bank loan.

In any event, the statute's legislative history offers little insight into the intention of Congress and provides no basis for overturning the Second Circuit's analysis of the statute's framework. To begin with, that history is extremely sparse. As the decision below noted,

> "the terms of § 1964(c) were not discussed at all in the Senate, whose final RICO bill did not contain a provision for a private right of action, [while] the discussions in the House of Representatives centered almost entirely on the provision of civil remedies to be enforced by the government rather than by private parties." 741 F.2d at 517; App. 15a.

The Court below (741 F.2d at 517; App. 16a) found that its analysis of the limited scope of § 1964(c) was consistent with the sole explanation of that section presented on the floor of either house:

> "[The section] provide[s] that private persons injured by reason of *a violation of the title* may recover treble damages in Federal courts—another example of the antitrust remedy being adapted for use against organized criminality." 116 Cong. Rec. 35,295 (1970) (remarks of Rep. Poff) (emphasis supplied).

In *Sedima* v. *Imrex*, *supra* n.5, another panel of the Second Circuit engaged in a comprehensive exploration of the legislative background of § 1964(c). 741 F.2d at 488-92; App. 58a-66a. It noted that Congress had debated several proposals for civil weapons to fight organized crime and that virtually all of these were to be employed by the government. The primary issue relating to private civil actions which Congress considered was how closely such actions should parallel private antitrust

suits.[9] No attention was given to the possibility, much less the wisdom, of displacing existing common or statutory law, or of authorizing a treble damages award for a wrong already compensable by actual damages. Section 1964(c) itself was added in the House, some time after the main outlines of the bill—which contained no provision for private remedies—had passed the Senate.

At the end of this discussion, *Sedima* stated:

> "The most important and evident conclusion to be drawn from the legislative history is that the Congress was not aware of the possible implications of section 1964(c). If Congress had intended to provide a federal forum for plaintiffs for so many common law wrongs, it would at least have discussed it. If Congress had intended to provide an alternate and more attractive scheme for private parties to remedy violations of the securities laws—involving decades of statutes, regulations, commentaries, and jurisprudence—it would at least have mentioned it. The House Judiciary Committee, which authored the provision, would at least have mentioned the amendment to the full House as a major change in its report had there been any inkling of its possible implications." 741 F.2d at 492; App. 66a.

As correctly noted in *Sedima*, the most striking aspect of the legislative history of § 1964(c) is its "clanging silence." *Id.*

Brushing aside this scholarly inquiry into the statute's origins, Bankers would invoke Congress' "clanging silence" to argue that the decision below should be reversed because the

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9 No light is shed on the legislative history of § 1964(c) by the statement of the Antitrust Section of the American Bar Association (Petition at 16) concerning the interrelationship between existing antitrust and proposed anti-organized-crime legislation. The ABA statement showed only that concepts of standing and causation applied in antitrust cases might not be appropriate for statutes designed to fight organized crime. The statement was not directed at the specific language of § 1964(c) and does not support an unreasonably broad application of that provision in the manner suggested by Bankers.

legislative history of § 1964(c) contains "nothing that suggests" a limitation on the type of injury required to sustain a civil RICO claim. Petition at 15. However, such an argument rests on a faulty understanding of the courts' proper role in applying new statutes. As the Second Circuit correctly perceived when it refused to extend the reach of § 1964(c), courts should not depart from established rules of law without an express statement of legislative intent. The Court below interpreted the civil provisions of RICO in a manner consistent with related laws, both federal and state, heeding the admonition that when a statute is not clear, it should be construed "with an eye to the surrounding statutory landscape and an ear for harmonizing potentially discordant provisions." *United States* v. *Bass*, 404 U.S. 336, 344 (1971).

Bankers would read the legislative silence as justifying a radical shift in the traditional allocation of jurisdiction between state and federal courts. To the contrary, this Court has frequently stated that the sensitive balance in our federal system is not to be upset unless expressly authorized by Congress. Thus, for example, in securities law cases this Court has, at times, declined to recognize federal causes of action: "Absent a clear indication of congressional intent, we are reluctant to federalize [a] substantial portion of the law of corporations." *Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462, 479 (1977). *Accord: Cort* v. *Ash*, 422 U.S. 66, 84 (1975). This Court has also been wary of disturbing the federal-state balance in the antitrust context:

> "The maintenance in our federal system of a proper distribution between state and national governments of police authority and of remedies private and public for public wrongs is of far-reaching importance. An intention to disturb the balance is not lightly to be imputed to Congress." *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 513 (1940).

Or, as this Court explained in *Federal Trade Commission* v. *Bunte Brothers, Inc.*, 312 U.S. 349, 351 (1941), "in ascertaining the scope of congressional legislation a due regard for a

proper adjustment of the local and national interests in our federal scheme must always be in the background."

Furthermore, this Court has warned that "absurd results are to be avoided." *United States* v. *Turkette*, *supra*, 452 U.S. at 580. As this Court observed in *Sorrells* v. *United States*, 287 U.S. 435, 450 (1932):

> "To construe statutes so as to avoid absurd or glaringly unjust results, foreign to the legislative purpose, is, as we have seen, a traditional and appropriate function of the courts. . . . The Congress by legislation can always, if it desires, alter the effect of judicial construction of statutes."

Thus, the Court below was properly sensitive to its judicial obligation to interpret a statute in the face of the "clanging silence" of the legislature. It fulfilled that obligation by looking to the policy of the statute as a whole in order to preserve and maintain legal harmony.[10] If, in fact, Congress concludes that civil provisions with the far-reaching and disruptive consequences Bankers advocates are desirable, it can, by legislation, alter the effect of the decision below.

Bankers invokes *United States* v. *Turkette*, *supra*, as authority for the proposition that, in enacting RICO, Congress intended to federalize large bodies of state common law. Petition at 15. A fair reading of *Turkette* shows, however, that it considered only the Congressional intent to "alter somewhat

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10 *See also In re Action Industries Tender Offer*, 572 F. Supp. 846, 850 (E.D. Va. 1983) ("Congress did not intend for RICO to be used by private plaintiffs to claim treble damages for ordinary violations of criminal and tort laws. The fact that the statute specifically requires a violation of Section 1962 and not just a violation of two or more predicate acts (listed in Section 1961) demonstrates that alleging predicate acts alone is not sufficient to maintain a civil RICO claim"); *Harper* v. *New Japan Securities International, Inc.*, 545 F. Supp. 1002, 1007-08 (C.D. Cal. 1982) ("Congress could not have intended to provide treble damages causes of action to persons whose only injury stems directly from the predicate acts alone. It is simply incomprehensible that a plaintiff suing under the securities laws would receive one-third the damages of a plaintiff suing under RICO for the same injury").

the role of the Federal Government in the war against organized crime." 452 U.S. at 589. Nothing can be inferred from *Turkette* about the scope or purpose of private civil RICO.[11]

There is a further reason to conclude that Congress did not intend the massive expansion of civil litigation in the federal courts that would result from Bankers' expansive reading of § 1964(c). A few months before the enactment of RICO, a bill was passed that created 58 new federal district judgeships. As the House Report to Senate Bill 952 (Pub. L. 91-272, codified in 28 U.S.C. § 133) makes plain, Congress was fully aware in 1970 of "the delay and confusion" in the district courts. The House Report noted with concern the "record backlogs" caused by the "sharp" increase from the preceding year of both civil and criminal filings. 1970 U.S. Code Cong. & Ad. News 3221, 3224.

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11 Bankers cannot draw any support from Congress' direction that RICO "shall be liberally construed to effectuate its remedial purposes." Organized Crime Control Act, § 904(a). Petition at 9. That direction does not absolve the courts of their obligation to look at "Congress' intent when it passed the legislation [rather than to make] unverifiable guesses as to what its intent would be" in procedural and factual contexts not contemplated by the statute. *Aetna Casualty and Surety Co.* v. *Liebowitz*, 730 F.2d 905, 908-09 (2d Cir. 1984).

It is notable that, in enforcing the criminal provisions of RICO, the Department of Justice has admonished prosecutors not to commence prosecutions "which are far afield from [its] Congressional purpose" because "the RICO statute, more so than most other Federal criminal sanctions, requires particularly careful and reasoned application." Department of Justice RICO Guidelines, *United States Attorneys' Manual*, Tit. 9, Ch. 110 (adopted Jan. 30, 1981), *reprinted in* ABA, Division of Professional Education, *RICO: The Ultimate Weapon in Business and Commercial Litigation*, Vol. I, Tab D-1, Attachment B (1983).

Among other things, these Guidelines discourage RICO indictments "which merely duplicate[] the elements of proof of a traditional Hobbs Act, Travel Act, mail fraud [or] wire fraud" case. At the same time they require centralized authorization by Department officers before a RICO criminal case can proceed. The impact of the decision below will similarly inhibit the inappropriate or duplicative use of the civil provisions of RICO.

It would be illogical to assume that a legislature actively seeking to solve the problem of severely overcrowded dockets would, without comment or explanation, simultaneously enact legislation dramatically expanding the *civil* jurisdiction of the federal courts to encompass cases normally (and competently) handled by state courts and bankruptcy courts.

C. The Purported Conflict In The Courts Of Appeals Does Not Support A Grant Of Certiorari In This Case

Bankers also argues (Petition at 18-22) that certiorari should be granted on the ground that the decision below conflicts with decisions in three other circuits.[12] The decision below does not, however, conflict with the holdings of either the Fifth or Eighth Circuits cited by Bankers. Although there is a direct conflict with the Seventh Circuit, that conflict is not such as to warrant a grant of certiorari in this case.

1. The decision below is not in conflict with the holdings of the Fifth and Eighth Circuits.

Bankers cites three decisions of the Fifth and Eighth Circuits, none of which held that a private RICO plaintiff has standing to sue for treble damages purely on the basis of injury caused by individual predicate acts. Either the courts construed the complaints before them as alleging an injury arising as a result of a pattern of racketeering activity or they declined to address the question.[13] Analysis of these decisions renders

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12 In support of its "conflict" argument Bankers cites a number of district court decisions as well. These add no weight to its petition. As a general matter, conflicts between decisions of a court of appeals and of a district court are not a sufficient basis for petitioning for certiorari. *See* Stern & Gressman, *Supreme Court Practice* (5th ed. 1978) at 278-79; Rule 19(1)(b) of this Court. Moreover, a substantial number of district courts have independently construed § 1964(c) in a manner consistent with the decision below. *See Sedima, supra*, 741 F.2d at 493 n.34; App. 68a n.34.

13 Following the filing of the decision below, two other Circuits, the Third and the Fourth, issued decisions relating to civil claims under RICO, but neither referred to the decision below or dealt with the

questionable Bankers' contention that "[t]he other Circuits that have considered this issue would uphold Bankers' right to sue." Petition at 19.

In *Alcorn County* v. *U.S. Interstate Supplies, Inc.*, 731 F.2d 1160 (5th Cir. 1984), a supplier was accused of selling goods at inflated prices, of bribing the purchaser's employee and of receiving payments for materials never delivered. In reviewing a decision rendered following a trial, the Fifth Circuit did not decide whether commission of predicate acts alone could constitute a "violation of § 1962"; instead it assumed that the bribery constituted the predicate act and that the fraudulent billing ("procured by bribery and threats" [731 F.2d at 1169]) was a compensable injury. No inference can be drawn as to how that Court would approach the present case.[14]

In *Bennett* v. *Berg*, 685 F.2d 1053 (8th Cir. 1982), *on reh.*, 710 F.2d 1361 (8th Cir.) (*en banc*), *cert. denied*, 104 S.Ct. 527 (1983), plaintiffs, elderly residents of a retirement community, alleged that the community had been financially mismanaged and subjected to corruption in consequence of which plaintiffs were in danger of losing the "life-care" which they had been promised. The Eighth Circuit focused primarily on the definition of a RICO "enterprise." However, in reversing dismissal of the RICO count, it noted that plaintiffs adequately alleged the conduct of the affairs of an enterprise distinct from a pattern of racketeering so as to support their claim that the cause of their injury was *not* merely attributable to the individual acts of mail or wire fraud alleged. 685 F.2d at 1059 n.5.

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issues raised herein. *Seville Industrial Machine Corp.* v. *Southmost Machinery Corp.*, 742 F.2d 786 (3d Cir. 1984) and *Battlefield Builders, Inc.* v. *Swango*, 743 F.2d 1060 (4th Cir. 1984).

14 Nor can any inference be drawn from the Fifth Circuit's prior decision, *Owl Construction Co.* v. *Ronald Adams Contractor, Inc.*, 727 F.2d 540 (5th Cir.), *cert. denied*, 53 U.S.L.W. 3237 (Oct. 1, 1984), which considered only whether organized crime allegations were required.

The Court further held that the alleged injury rose to a level *beyond* that flowing from the isolated wrongful acts of the defendants, carefully distinguishing predicate acts of racketeering from a violation of § 1962(c). 685 F.2d at 1060-61.

In *Alexander Grant & Co.* v. *Tiffany Industries, Inc.*, 742 F.2d 408 (8th Cir. 1984), the Court held sufficient a complaint by an accounting firm alleging that it was damaged by a scheme involving predicate acts of mail and wire fraud which misled it into rendering a favorable audit. The injury was "theft of services," *i.e.*, the uncompensated excessive work that the plaintiff had to perform because of the fraud, together with legal expenses in an SEC investigation and loss of reputation.

Significantly, the Eighth Circuit recognized that a complaint seeking to recover merely for predicate-act injury was insufficient; however, it held that plaintiff had met its pleading burden:

> "[I]t is clear that Grant's complaint does not simply allege injury from the underlying predicate acts. It contends that Tiffany was conducted through a pattern of mail and wire fraud that enabled it to remain in business. As a result of this extended life, Grant continued to provide its accounting services to Tiffany for a time greater than it would have had the fraud not occurred. This also increased the harm resulting to Grant's business reputation. We conclude that these allegations sufficiently plead an injury 'by reason of' a RICO violation." 742 F.2d at 413.

While noting that the interpretation of the applicable provisions of RICO in the *Bankers Trust* decision was "far narrower" than its own, *Grant* explicitly recognized that the two decisions were consistent. 742 F.2d at 413.[15] Bankers thus has no basis for alleging a conflict with the Eighth Circuit.

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15 *Grant* rejected the "mobster" injury requirement of *Sedima* (742 F.2d at 413); *see* n. 7, *supra*.

2. The conflict with the Seventh Circuit does not support a grant of certiorari in this case.

The Seventh Circuit's decision in *Haroco, Inc.* v. *American National Bank & Trust Co.*, No. 83-2529 (7th Cir. Oct. 19, 1984), does conflict with the decision below. However that decision incorrectly analyzes the applicable law and does not support Bankers' petition for a writ in the present case.

Haroco involved miscalculation of interest by a bank. The complaint alleged a RICO violation on the ground that the bank had committed mail fraud by charging plaintiff corporations interest in excess of "one per cent over the bank's prime rate," the rate specified in a loan agreement. Slip op. at 2.

The District Court held that plaintiffs had alleged an injury arising only from the predicate acts of mail fraud; it dismissed the complaint as failing to state a RICO violation. 577 F. Supp. 111 (N.D. Ill. 1983). Although the Seventh Circuit recognized that "it does not seem at all likely that Congress anticipated the application of civil RICO to improperly calculated interest charges by a commercial bank," it nonetheless reinstated the complaint because "Congress appears to have preferred a broad statute, even if overinclusion might result." Slip op. at 29.[16]

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16 Although sustaining the complaint, *Haroco* expressed doubt that Congress had actually intended that RICO apply to the fact-pattern before it. Similar doubts previously had been expressed by other Seventh Circuit panels. Thus, in *Schacht* v. *Brown*, 711 F.2d 1343, 1361 (7th Cir.), *cert. denied*, 104 S.Ct. 508 (1983), the Court wrote:

> "Congress, by granting both plaintiff and defendant status to 'any person' who possesses the rudimentary connection with the operation of an enterprise through predicate offenses or who suffers injury therefrom, may well have created a runaway treble damage bonanza for the already excessively litigious. . . . The legislature having spoken, it is not our role to reassess the costs and benefits associated with the creation of a dramatically expansive, and perhaps insufficiently discriminate, tool for combating organized crime."

Similarly in *Sutliff, Inc.* v. *Donovan Companies*, 727 F.2d 648, 654 (7th Cir. 1984), the Court wrote:

> "Congress deliberately cast the net of liability wide, being more concerned to avoid opening loopholes through which the minions of

In reaching this conclusion *Haroco* incorrectly rejected, without any reasoned explanation, both the analysis of RICO's legislative history in *Sedima* and the statutory analysis in the *Bankers Trust* decision. Under *Haroco*, virtually any plaintiff, by adding allegations of "mail fraud" or "wire fraud," can convert a common law action into a federal action for treble damages. As previously shown, there is no basis in the legislative history to support such a radical shift in the traditional allocation of jurisdiction between the state and federal courts.

In summary, the decision below does not conflict with the holdings of the Fifth and Eighth Circuits. Because the conflict with *Haroco* reflects a misreading by the Seventh Circuit of the statute's text and legislative purpose, that conflict does not support a grant of certiorari in this case.[17]

> organized crime might crawl to freedom than to avoid making garden-variety frauds actionable in federal treble-damage proceedings—the price of eliminating all possible loopholes. [citations omitted]. We must abide by Congress's decision, made at a time of less sensitivity than today to the workload pressures on the federal courts and to the desirability of maintaining a reasonable balance between state and federal courts, however much we may regret not only the burdens that the decision has cast on the federal courts but also the displacement of state tort law into the federal courts that it has brought about."
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> The Seventh Circuit's method of statutory interpretation lacks persuasiveness. Its approach indicates an inability to recognize the significance of the "clanging silence" of Congress as to the civil provisions of RICO. The Seventh Circuit's rationale may not, in the circumstances, be viewed as an appropriate exercise of deference to legislative judgment. By drawing carefully restrained inferences from the statute's language, purpose and legislative history, the Second Circuit, it is submitted, reached the proper conclusion as to the requirement of a RICO injury.

17 Bankers also makes a tentative attempt (Petition at 9-10, 21-22) to argue for a grant of certiorari on the basis of an alleged conflict *within* the Second Circuit involving the decision below, *Sedima* and *Furman* v. *Cirrito*, 741 F.2d 524 (2d Cir. 1984) [App. 107a-27a], *petition for cert. filed sub nom. Joel* v. *Cirrito*, 53 U.S.L.W. 3343 (Oct. 15, 1984) (No. 84-604). This argument is devoid of merit. Any conflict within the Second Circuit would be a matter for the Second Circuit, not this Court, to resolve. *See Davis* v. *United States*, 417 U.S. 333, 340 (1974). But there is no conflict. The holdings of all three cases were consistent. Although the *Furman* panel expressed its disagreement with the other

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EVEN IF A DISTINCT RICO INJURY NEED NOT BE ALLEGED, CERTIORARI SHOULD NOT BE GRANTED

Whether or not the Second Circuit was correct in its reading of the RICO injury requirement, sound reasons of judicial economy favor the denial of Bankers' petition:

(a) review is premature until the civil provisions of RICO receive further interpretation by the lower federal courts or until Congress is given an opportunity to act;

(b) even if the RICO injury requirement set forth in the decision below reflects an erroneous reading of the statute, the simple breach of contract claim alleged by Bankers cannot support its civil RICO claim; and

(c) if this case were remanded, Bankers' complaint would have to be dismissed on grounds unrelated to RICO, *i.e.*, its claims are within the exclusive jurisdiction of the bankruptcy court and are barred by the statute of limitations.

A. Review Of The RICO Injury Requirement At This Time Would Be Premature

In reviewing petitions for certiorari this Court has considered, among other things, whether a grant of the petition would be either premature, because the legal context for applying the statute remains unclear, or futile, because the statutory provision at issue may soon be modified. Both of these tests apply to this case.

Thus, it has been stated that certiorari will be denied where it "may be desirable to have different aspects of an issue further illuminated by the lower courts." *Maryland* v. *Baltimore Radio Show, Inc.*, 338 U.S. 912, 918 (1950) (Frankfurter, J.). This Court has also recognized that it may at times be unwise to

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two decisions, it recognized that those decisions had to be followed. *Furman* should be viewed as essentially a dissenting opinion, not a manifestation of intracircuit conflict.

pass "upon the possible significance of the manifold provisions of a broad statute in advance of efforts to apply the separate provisions." *Watson* v. *Buck*, 313 U.S. 387, 402 (1941).

In the present case these principles militate strongly against granting the writ. Although RICO was enacted in 1970, its employment in private treble-damage actions is a very recent phenomenon. The overwhelming majority of the decisions in the lower courts have concerned matters of pleading, with little scrutiny of the facts. It is therefore appropriate for this Court to allow a further development of decisional law in the lower courts to enable the identification of significant issues of scope and applicability.

The other reason why granting the petition would be premature is that the statute may soon be modified. This Court has, at times, declined to accept cases where the likelihood that a statute will soon be modified either makes review unnecessary or minimizes the future importance of the question presented. *See Sanks* v. *Georgia*, 401 U.S. 144, 149-53 (1971); *District of Columbia* v. *Sweeney*, 310 U.S. 631 (1940).

Whatever the obscurities in the statute's previous history, Congress is now aware of the problems and complexities surrounding civil RICO. On October 5, 1984, the chairman of the Senate Judiciary Committee stated:

> "[W]hen we acted on this RICO statute as part of the Organized Crime Control Act of 1970, I think it is fair to observe that we might not have envisioned the full use of the statute by private civil litigants to include a civil RICO count in their ordinary business litigation alleging misstatements and fraud.
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> * * *
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> It is, therefore, imperative that the Congress hold hearings as soon as possible on this issue to determine if the intention of the Congress in enacting RICO is being carried out, and, if not, what legislative changes are necessary to bring that about. It is my intention to hold such hearings as soon as possible next year after the Congress convenes." 130 Cong. Rec. 13,350 (remarks of Sen. Thurmond).

In view of the distinct possibility that Congress might act soon to amend the statute, a decision at this time in the present case might be of little lasting significance.

B. Bankers' Simple Breach Of Contract Claim Cannot Support A RICO Action

Review of the need for a distinct RICO injury is not appropriate in this case because Bankers' alleged injury does not fall even within a broad reading of RICO. Bankers' alleged injury arises from a simple breach of contract as to which no fraud in the inducement is alleged; thus, the later independent acts of respondents cannot provide the required connection to a violation of RICO.

Cases decided under the antitrust laws demonstrate that traditional tort or contract claims may not be converted into violations of federal law so as to support federal jurisdiction or treble damages. Relief under the antitrust laws is available only for injuries that flow "from that which makes defendants' acts unlawful." *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). In *Associated General Contractors, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519 (1983), this Court stated that to assert a claim under the antitrust laws a plaintiff must allege a "causal connection" between the antitrust violation and the harm he has suffered. Typically, courts rest their causal analysis on the requirement in section 4 of the Clayton Act, 15 U.S.C. § 15, that the injury be "by reason of" an antitrust violation, a verbal formula that also appears in § 1964(c).

When, as in Bankers' case, the alleged injury resulted solely from a tort or a breach of contract, courts routinely hold that no antitrust claim is stated. Thus, in *A.D.M. Corp.* v. *Sigma Instruments, Inc.*, 628 F.2d 753, 754 (1st Cir. 1980), the Court declined to find that " 'mere' unfair business practices or business torts" (such as disloyal acts by corporate officials) were federal antitrust violations. An "essential connection" with the antitrust laws also was found lacking in a claim arising from a breach of a contract, allegedly for anti-competitive

reasons, on the ground that the contract itself was not violative of those laws. *Chrysler Corp.* v. *Fedders Corp.*, 643 F.2d 1229 (6th Cir.), *cert. denied*, 454 U.S. 893 (1981). *See also Snyco, Inc.* v. *Penn Central Corp.*, 551 F. Supp. 949 (E.D. Pa. 1982).

Similarly, in *Fields Productions, Inc.* v. *United Artists Corp.*, 318 F. Supp. 87 (S.D.N.Y. 1969), *aff'd*, 432 F.2d 1010 (2d Cir.) (*per curiam*), *cert. denied*, 401 U.S. 949 (1971), it was held that the cause of the plaintiff's injury was not an antitrust violation, but an improper allocation of profits derived from block booking of motion pictures. The District Court explained:

> "[I]t is difficult to see how the block booking could have caused injury to [the] plaintiff, incidental or not. . . . This may be a breach of contract, but it is not a violation of the antitrust laws. Plaintiff is already suing defendant for breach of contract. . . . That would seem to be plaintiff's proper remedy."[18]

Thus even if, in the abstract, the question of a distinct RICO injury requirement presented an appropriate issue for review at this time, Bankers' petition should nevertheless be denied. Regardless of the correctness of the statutory interpretation below, Bankers' injury flows not from any violation of RICO but from a simple breach of contract. Accordingly, whether or not *Haroco* is correct, certiorari should be denied here.

C. The Complaint Is Subject To Dismissal On Other Grounds

A final reason for denying certiorari is that Bankers' complaint would still be subject to dismissal even if no distinct

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18 *Cf. Mulvey* v. *Samuel Goldwyn Productions*, 433 F.2d 1073 (9th Cir. 1970), *cert. denied*, 402 U.S. 923 (1971). Significantly, within a single term, this Court denied certiorari to both *Mulvey* and *Fields*, in the face of the express statement in *Mulvey* that "[w]e disagree with the contrary conclusion on the standing issue reached by the Second Circuit, per curiam. . . ." 433 F.2d at 1076 n.4. Thus, contrary to Bankers' apparent belief, the mere existence of a direct conflict between two circuits does not, in itself, provide a sufficient basis for the issuance of a writ of certiorari.

RICO injury allegation were required because: (i) the bankruptcy court has exclusive jurisdiction of the claim asserted; and (ii) Bankers' claim is barred by the statute of limitations.

1. The bankruptcy court has exclusive jurisdiction.

Any cause of action for damages arising from the alleged concealment of the Brookfield asset belongs to BAC, not Bankers, and arises exclusively from matters within the purview of the pending BAC bankruptcy proceeding.[19] Only BAC or, if an order for relief is entered, its trustee, has standing to assert such a claim. Moreover, the determination as to whether it should be pursued must, in the first instance, be presented to the bankruptcy court. Bankers may not treat BAC's claim as its own and bypass BAC's pending bankruptcy proceeding (*see* note 2, *supra*) to pursue independently any alleged rights of BAC's creditors under RICO.

2. Bankers' claim is time barred.

Because Congress did not provide an express statute of limitations for RICO, the state limitations period governing

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19 *See Gochenour* v. *George & Frances Ball Foundation*, 35 F. Supp. 508 (S.D. Ind. 1940), *affirmed as "sound" and opinion adopted by reference as the opinion of the Court of Appeals*, 117 F.2d 259 (7th Cir.) (*per curiam*), *cert. denied*, 313 U.S. 566 (1941), a class action by creditors commenced while a bankruptcy proceeding was pending. In *Gochenour*, the complaint charged that defendants had realized improper profits by conspiring to acquire the debtor's assets at an inadequate price. The District Court (35 F. Supp. at 515) held that the cause of action was an asset within the jurisdiction of the bankruptcy court and that the debtor in possession, which owned such asset, had the exclusive right to maintain the action.

See also Gochenour v. *Cleveland Terminals Bldg. Co.*, 118 F.2d 89, 93 (6th Cir. 1941) (creditors' claims were claims of the debtor in possession over which the bankruptcy court had exclusive jurisdiction); *Graybar Electric Co.* v. *Doley*, 273 F.2d 284, 292 (4th Cir. 1959); *Rothstein* v. *Seidman & Seidman*, 410 F. Supp. 244, 250 (S.D.N.Y. 1976); and *Sloan* v. *Clark*, 18 N.Y.2d 570, 575, 277 N.Y.S.2d 411, 223 N.E.2d 893 (1966).

analogous actions is applied.[20] Under New York law, which is controlling here, the longest limitations period arguably available is six years.[21]

A claim such as Bankers' accrues "when plaintiff first suffered a loss as a result of defendant's fraudulent conduct." *Rice* v. *Baron*, 456 F. Supp. 1361, 1368 (S.D.N.Y. 1978). *Accord*: *Stull* v. *Bayard*, *supra*, 561 F.2d at 432. As previously noted, the plan of arrangement which, according to Bankers, improperly relieved BAC of $4.3 million in debt, was approved by the bankruptcy court in March 1976. 741 F.2d at 513; App. 7a. Thus, any injury arising from the alleged fraudulent discharge of BAC accrued no later than March 1976.

The alleged "consummation" of the concealment scheme several months later—when Brookfield was supposedly returned to BAC—is irrelevant for limitations purposes. A party injured by a continuing course of conduct "may bring suit as soon as the damage to him is inflicted; he obviously need not wait until the termination of the conspiracy which caused it . . . and the statute therefore begins to run at the moment such injury occurs."[22]

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20 *See, e.g.*, *Board of Regents* v. *Tomanio*, 446 U.S. 478, 483-84 (1980); *Armstrong* v. *McAlpin*, 699 F.2d 79 (2d Cir. 1983); *IIT* v. *Cornfeld*, 619 F.2d 909, 928 (2d Cir. 1980); *Stull* v. *Bayard*, 561 F.2d 429, 431 (2d Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978).

21 Section 213(8), N.Y. Civil Practice Law and Rules (McKinney ed. 1972). *See Estee Lauder, Inc.* v. *Harco Graphics, Inc.*, 82 Civ. 8188 (CBM) (S.D.N.Y. March 21, 1984); *Prudential Lines, Inc.* v. *McKeon*, 80 Civ. 5853 (MJL) (S.D.N.Y. April 21, 1982); *contra*, *Teltronics Services, Inc.* v. *Anaconda-Ericsson, Inc.*, 587 F. Supp. 724 (E.D.N.Y. 1984) (three-year statute); *cf. Durante Bros. and Sons, Inc.* v. *Flushing National Bank*, 571 F. Supp. 489 (E.D.N.Y. 1983).

22 *Rutkin* v. *Reinfeld*, 229 F.2d 248, 252 (2d Cir.), *cert. denied*, 352 U.S. 844 (1956). *Accord*: *Korry* v. *International Telephone & Telegraph Corp.*, 444 F. Supp. 193, 195 (S.D.N.Y. 1978). *See also Dolmetta* v. *Uintah National Corp.*, 712 F.2d 15 (2d Cir. 1983), holding that New York's six-year fraud statute began to run when the plaintiff bank "suffered some loss as a result of defendants' fraudulent acts". The Court rejected as "artificial and unconvincing" plaintiffs' attempt to

Only if subsequent acts causing injury take place within the statutory period may a new claim be asserted, and even that claim must be limited to the additional damage allegedly inflicted. Thus, the repetition of a particular wrong does not revive a time-barred claim; it merely provides the basis for a new claim if the repetition itself causes further damage.[23]

Bankers also may not claim the benefit of the doctrine of fraudulent concealment. Not only did its complaint fail to comply with the requirements for pleading that doctrine (*see, e.g.*, *Armstrong* v. *McAlpin*, *supra*, 699 F.2d at 88-89) but, more significantly, even if the doctrine of fraudulent concealment were sufficiently alleged, Bankers' claims still would be barred. Under N.Y. Civil Practice Law and Rules § 203(f) (McKinney ed. 1972), claims alleging fraudulent concealment as a basis to toll an otherwise expired statute of limitations

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avoid this conclusion by characterizing a subsequent transfer of assets acquired with funds embezzled from plaintiffs as a fraud "separate and distinct" from the original embezzlement. It stated:

> "The [subsequent] transfer did not represent a new and separate loss to the Bank. Rather, the conveyance was at most a post-fraud secretion designed to preserve the success of a fraud that had occurred long since." 712 F.2d at 19.

See also Woodbridge Plastics, Inc. v. *Borden, Inc.*, 473 F. Supp. 218, 221 (S.D.N.Y.), *aff'd*, 614 F.2d 1293 (2d Cir. 1979), citing *Imperial Point Colonnades Condominium, Inc.* v. *Mangurian*, 549 F.2d 1029, 1035 (5th Cir.), *cert. denied*, 434 U.S. 859 (1977) and *Rice* v. *Baron*, *supra*, 456 F. Supp. at 1368.

Nor may Bankers successfully claim that respondents' conduct constituted a "continuing wrong" as to which the statute did not begin until the conduct terminated. *See, e.g.*, *Korry* v. *International Telephone & Telegraph Corp.*, *supra* (the statute of limitations begins to run at the moment injury occurs) and *Sporn* v. *MCA Records, Inc.*, 58 N.Y.2d 482, 462 N.Y.S.2d 413, 448 N.E.2d 1324 (1983).

23 In *Kadar Corp.* v. *Milbury*, 549 F.2d 230, 234 (1st Cir. 1977), plaintiffs argued that their claims accrued on the date of the last overt act committed in furtherance of a civil conspiracy, pointing to purported overt acts of certain defendants in 1973-75 to hold open claims arising from acts committed in 1971-72. The Court rejected this contention and dismissed the claims.

must be asserted within two years from the time the wrongdoing was, or with reasonable diligence should have been, discovered.

Here, Bankers' claim accrued in March 1976 and, as is clear from its commencement of a proceeding to revoke confirmation of the BAC plan in September 1976, Bankers had discovered the alleged wrongdoing by that date. Thus, under the controlling authorities,[24] the right to pursue a claim for relief based upon the alleged concealment of the Brookfield asset expired no later than March 1982—six years from the accrual of the claim in March 1976 (CPLR § 213[8])—since such date was later than September 1978—two years from discovery of the alleged wrong (CPLR § 203[f]). Because Bankers' claim was not asserted within the applicable period, it is time barred; the fact that it was asserted within *six years* of discovery is of no legal consequence.

Thus, even if a distinct RICO injury were not required, the fact that the decision below would be affirmed on other grounds argues strongly against granting Bankers' petition.

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24 *Hoff Research & Development Laboratories, Inc.* v. *Philippine National Bank*, 426 F.2d 1023, 1025-27 (2d Cir. 1970); *Cestaro* v. *Mackell*, 429 F. Supp. 465 (E.D.N.Y.), *aff'd*, 573 F.2d 1288 (2d Cir. 1977); *Rickel* v. *Levy*, 370 F. Supp. 751, 755-56 (E.D.N.Y. 1974).

CONCLUSION

The petition for a writ of certiorari should be denied.

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Respectfully submitted,

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